Petition

81-598

Office - Supreme Court, U.S.
FILED
SEP 25 1981
ALEXANDER L. STEVAS,
CLERK

NO. _____
IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

RICHARD HALE AUSTIN,
Petitioner,
v.
STATE OF TENNESSEE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

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QUESTIONS PRESENTED

1. Does the Tennessee Death Penalty Act constitute "cruel and unusual punishment" prohibited by the Eighth Amendment to the United States Constitution, which is made applicable to the States by the Fourteenth Amendment to the United States Constitution?

2. Does the Tennessee Death Penalty Act violate the Sixth Amendment to the United States Constitution, which is made applicable to the States by the Fourteenth Amendment to the United States Constitution, by failing to place the accused on notice of the State's intended proof of aggravating circumstances?

3. Does the Tennessee Death Penalty Act violate constitutional prohibitions of vagueness by failing to define the standards by which mitigating circumstances are to be determined and weighed against any aggravating circumstances?

4. Does the Tennessee Death Penalty Act violate the Eighth and Fourteenth Amendments to the United States Constitution by not requiring the jury to make specific findings as to the presence or absence of mitigating circumstances and thus requiring the reviewing court to presume certain findings as to the presence or absence of mitigating circumstances?

5. Does the Tennessee Death Penalty Act violate the Fourteenth Amendment to the United States Constitution by allowing, in the sentencing proceeding, the introduction of evidence against the Defendant which is otherwise inadmissable under rules of evidence?

6. Does the Tennessee Death Penalty Act violate the Double Jeopardy provision of the Fifth Amendment to the United States Constitution, which is made applicable to the States by the Fourteenth Amendment to the United States Constitution?

7. Does the Tennessee Death Penalty Act violate the Eighth and Fourteenth Amendments to the United States Constitution by failing to assure proportionality review is conducted in capital-sentencing procedures?

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

The Petitioner, Richard Hale Austin, respectfully prays that a writ of certiorari be issued to review the judgment and opinion of the Supreme Court of Tennessee entered on May 26, 1981, affirming his conviction and sentence of death by electrocution.

OPINION BELOW

The opinion below of the Supreme Court of Tennessee appears in the Appendix as A-1 hereto and as of the date of this writing, the decision has not been reported. A petition for rehearing was timely filed on behalf of the Petitioner. The Order of the Supreme Court of Tennessee denying the Petition for Rehearing filed on behalf of the Petitioner is dated July 27, 1981 and appears in the Appendix as A-2.

JURISDICTION

The judgment and opinion of the Supreme Court of Tennessee was dated May 26, 1981. A petition for rehearing was timely filed on July 6, 1981. The order denying the petition for rehearing is dated July 27, 1981. This Petition for Writ of Certiorari to the Supreme Court of Tennessee is filed within the time allowed by this Court. This Court's jurisdiction is invoked under 28 U.S.C. §1257 and 28 U.S.C. §2101.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

I. CONSTITUTION OF THE UNITED STATES, Amendment V:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment by a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

II. CONSTITUTION OF THE UNITED STATES, Amendment VI:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

III. CONSTITUTION OF THE UNITED STATES, Amendment VIII:

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

IV. CONSTITUTION OF THE UNITED STATES, Amendment XIV:

". . .[N]or shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

V. TENNESSEE CODE ANNOTATED, Section 39-2402 (Supp. 1980):

"(a) Every murder perpetrated by means of poison, lying

in wait, or by other kind of willful, deliberate, malicious, and premeditated killing, or committed in the perpetration of, or attempt to perpetrate, any murder in the first degree, arson, rape, robbery, burglary, larceny, kidnapping, aircraft piracy, or the unlawful throwing, placing or discharging of a destructive device or bomb, is murder in the first degree.

"(b) A person convicted of murder in the first degree shall be punished by death or by imprisonment for life."

VI. TENNESSEE CODE ANNOTATED, Section 39-2404 (Supp. 1980):
Due to the length of this Statute it is attached hereto in the Appendix as A-3.

VII. TENNESSEE CODE ANNOTATED, Section 39-2406 (Supp. 1980):
Due to the length of this Statute it is attached hereto in the Appendix as A-4.

STATEMENT OF THE CASE

The Petitioner, Richard Hale Austin, was indicted in May of 1977. The Petitioner was indicted as an assessory before the fact to murder in the first degree. The Petitioner, on October 22, 1977, was convicted of the offense of assessory before the fact of murder in the first degree in Division VI of the Criminal Court of Shelby County, Tennessee, Judge James C. Beasley presiding, and sentenced to death by electrocution. The Petitioner was represented throughout the trial and the motion for a new trial by Robert I. Livingston, Esquire.

On November 7, 1977, a Motion for New Trial was filed. In the Motion for New Trial the Petitioner argued that the evidence was not sufficient to sustain the verdict and that the evidence preponderated in favor of the Petitioner's innocence. The Petitioner also charged that the Tennessee Death Penalty Act was contrary to the Constitutions of the State of Tennessee and the United States of America. A copy of said Motion for New Trial is attached hereto in the Appendix as A-5.

Petitioner's present counsel (hereinafter referred to as the

Glankler firm) engaged in numerous discussions and correspondence with Robert I. Livingston, Esquire, during the pendency of the Motion for New Trial and received assurance from Attorney Livingston that he would entertain and accept their suggestions as to matters to be included in either an amended or supplemental Motion for A New Trial. The Glankler firm was initially retained by the family of the Petitioner to review the trial transcript and work with the Petitioner's former counsel, Robert I. Livingston, towards the end of ascertaining whether or not reversible error existed during the course of the prosecution.

Petitioner's present counsel on November 7, 1977, wrote Robert I. Livingston, confirming that Livingston would take all necessary steps to protect Mr. Austin's interests by advising Judge Beasley that other counsel were undertaking to review the transcript and that an extension of time within which to file a motion for new trial was necessary. It was pointed out that it would take from six weeks to possibly two months in order to secure the transcript prepared by court reporters.

On November 11, 1977, Livingston wrote the Glankler firm and indicated he would be glad to move the court for leave to file an amended and supplemental motion for a new trial in the event that Glankler firm determined that there were matters which would warrant being raised in such motion.

On January 18, 1978, Petitioner received a letter from Robert I. Livingston confirming the agreement to seek additional time on the motion for new trial so that the Glankler firm would have an opportunity to study the trial transcript. The full trial transcript was not available on January 27, 1978, the date for hearing of the Motion of a New Trial.

On January 24, 1978, the Glankler firm secured a sworn statement from the confessed, convicted killer of Julian Watkins, one Jack Charles Blankenship. The Petitioner had been convicted as an assessory before the fact to the murder of Julian Watkins. In Mr. Blankenship's statement he describes in detail the facts surrounding the death of Julian Watkins. Said statement is totally exculpatory of any participation by, or connection with, Petitioner regarding the circumstances and fact of the death of Julian Watkins.

Although the Glankler firm obtained a sworn statement from

Blankenship on January 21, 1978, Petitioner's former counsel, Robert I. Livingston, had interviewed Jack Charles Blankenship in the Shelby County Jail prior to Petitioner's trial in October, 1977, and had learned that Blankenship stated that Petitioner had absolutely nothing to do with the murder of Julian Watkins. The Petitioner urged Livingston to call Blankenship as defense witness, but Livingston failed and refused to do so at the trial.

On January 26, 1978, immediately after the Glankler firm obtained the sworn statement of Jack Charles Blankenship, a conference was requested and granted with the court in chambers together with the State's attorney and Mr. Livingston, to arrange a further resetting of the pending Motion for New Trial set for hearing the following day, January 27, 1978. At that conference, Mr. Livingston declined to request a further resetting of the matter.

On January 27, 1978, Mr. Livingston submitted the Petitioner's Motion for New Trial to the Court without argument and summarily handed to the trial court an order overruling the Motion for New Trial and granting an appeal. Thereafter, Petitioner took immediate steps to terminate Mr. Livingston's further representation of him.

Thereafter, the Glankler firm entered an appearance on the record on February 24, 1978, and filed a Petition to Rehear Defendant's Motion for New Trial. The Court set a hearing date of March 15, 1978, on said Petition. On March 21, 1978, the trial court denied Petitioner's Motion to Rehear the Motion for a New Trial.

The Petitioner perfected a direct appeal to the Supreme Court of Tennessee pursuant to Tennessee Code Annotated §39-2406 (Supp. 1980). However, during the pendancy of the Appeal the Petitioner filed a Petition for Writ of Error Coram Nobis in the trial court. The Petition for Writ of Error Coram Nobis was based upon three (3) grounds: (1) Incompetence of trial counsel, Robert I. Livingston, Esquire, whose active and prejudicial conduct completely frustrated the Petitioner's rights and best interests and were totally at war with the attorney-client relationship during the trial and especially prior to and during the pendency of the Motion for New Trial; (2) Newly discovered evidence in the form of a sworn statement from one Levi Haywood, who, under oath, stated that subsequent to the trial of Petitioner, the State's leading witness against Petitioner, Mr. Terry Casteel, told Mr. Haywood that he committed perjury and falsely implicated the Petitioner because of coercion on behalf

of the officers of the State of Tennessee; and (3) The sworn statement of Jack Charles Blankenship, the confessed killer of Julian Watkins, who stated that the Petitioner had absolutely nothing to do with the murder of Julian Watkins. The statement of Mr. Blankenship was available to Petitioner's former counsel and, even though Petitioner urged and pleaded with his counsel to use the testimony of said Jack Charles Blankenship, Petitioner's former counsel failed to call said person as a witness on behalf of the Petitioner.

On July 18, 1978, the Petitioner filed a Motion for Recusal, seeking that Judge James C. Beasley recuse himself from determining the merits of the Petition for Writ of Error Coram Nobis because on July 8, 1978, the Honorable James C. Beasley proceeded to make a public statement to members of the press, to-wit, the *Nashville Tennessean*. In said statement and in referring to Robert I. Livingston, Esquire, the Court stated:

> "I don't think he is an incompetent counsel. I think Mr. Livingston is an able lawyer. I have never seen a lawyer in my court who was incompetent."

The Honorable Judge Beasley went on to state that he felt Livingston gave Austin a good defense. The Petitioner, in said Motion for Recusal, respectfully submitted that the Honorable Court had, by virtue of the statements, prejudiced a material issue before the Court, namely the competency of trial counsel. The trial court, on July 20, 1978, orally denied the Motion for Recusal.

On July 20, 1978, the trial court orally decided that the court did not have jurisdiction in which to hear the Petition for Writ of Error Coram Nobis while an appeal of the case in chief was pending. The court intimated that it would deny the motion of the state to dismiss the Petition for Writ of Error Coram Nobis, but would hold said Petition in abeyance until the conclusion of the appeal. The Petitioner appealed the trial court's ruling on his Petition for Writ of Error Coram Nobis.

In an opinion dated October 6, 1978, the Supreme Court of Tennessee held that the writ had been prematurely filed and that the trial court had no jurisdiction to entertain the Petition for Writ of Error Coram Nobis until the conviction of October 22, 1977, became "final". The Court also stated that the trial court was without authority to take any action whatsoever with respect to the Petition

including holding it in abeyance. The Court also stated that the foregoing view of the jurisdictional issue rendered the issue of recusal moot.

The Petitioner thereafter sought to pursue his appeal of his conviction and sentence of death by electrocution. The Petitioner raised several constitutional issues in his assignment of errors and brief and arguments filed in his appeal to the Supreme Court of Tennessee. The Petitioner respectfully submitted to the Supreme Court of Tennessee that Tennessee Public Act, 1977, Chapter 51, §1-8 (Tennessee Code Annotated §29-2402 et seq.), hereinafter referred to as the Tennessee Death Penalty Act, was violative of the Eighth and Fourteenth Amendment to the United States Constitution and that the death penalty under all circumstances constitutes cruel and unusual punishment. The Petitioner also argued that the Tennessee Death Penalty Act is constitutionally defective for failing to place the accused on notice of the State's intended proof of aggravating circumstances. The Petitioner also argued that the Tennessee Death Penalty Act is constitutionally defective by requiring mandatory sentences. The Petitioner argued that the assessment of the death penalty in his case was disproportionate and thus unconstitutional. The Petitioner argued that the Tennessee Death Penalty Act is unconstitutional because of impermissible vagueness. The Petitioner further argued that the Tennessee Death Penalty Act is unconstitutional by allowing during the sentencing proceeding the introduction of evidence against a Defendant which is otherwise inadmissible under rules of evidence. The Petitioner also argued that the Tennessee Death Penalty Act is unconstitutional as violative of double jeopardy. The Petitioner also contended that the evidence submitted during the trial preponderated in favor of his innocence.

In the Petitioner's Petition for Rehearing filed subsequent to the judgment and opinion of the Tennessee Supreme Court upholding the Petitioner's conviction and sentence, the Petitioner argued that Tennessee Code Annotated §§39-2402 et seq. and the Tennessee Supreme Court Rule 47 promulgated thereunder falls outside of constitutional requirements in that a jury is not required to make specific findings as to the presence or absence of mitigating circumstances and that the Supreme Court of Tennessee, in reviewing cases in which the death penalty was handed down, is required to presume certain findings relative to the presence or absence of

mitigating circumstances. In the Petition for Rehearing, it was also argued that the mechanism instituted by the Tennessee Legislature and the Supreme Court of Tennessee to provide proportionality review fails to assure that capital-sentencing procedures will be administered in an even-handed manner. Additionally, the Petitioner argued that even if Tennessee Code Annotated §§30-2402 et seq. and the rule of the Tennessee Supreme Court promulgated thereunder are constitutionally sound, the imposition of the death penalty in his case is inappropriate, unfair and in violation of Tennessee Code Annotated §39-2406(c).

An order denying the Petition for Rehearing was entered on July 27, 1981.

An application to the Supreme Court of Tennessee for a Stay of Execution during the pendency of a Petition for Writ of Certiorari was filed on August 5, 1981. Said application was granted by an Order dated August 12, 1981. This Petition for Writ of Certiorari to the Supreme Court of Tennessee has followed.

ARGUMENT IN SUPPORT OF GRANTING THE WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

The Petitioner is fully aware that review on a writ of certiorari is not a matter of right, but is of judicial discretion, and will be granted only when there are special and important reasons therefor. The Petitioner respectfully submits that there are special and important reasons for issuing a writ of certiorari to the Supreme Court of Tennessee. The Supreme Court of Tennessee has decided important questions of federal law which have not been, but should be, settled by this Court. The decision of the Supreme Court of Tennessee in this Petitioner's case conflicts with applicable decisions of this Court.

I.

TENNESSEE CODE ANNOTATED §§39-2402, ET SEQ. (HEREINAFTER REFERRED TO AS THE DEATH PENALTY ACT) IS VIOLATIVE OF THE EIGHTH AND FOURTHEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Counsel for the Petitioner is aware that the plurality of the Supreme Court in *Furman v. Georgia*, 408 U.S. 238, 100 S.Ct. 1759, 33 L.Ed.2d 346 (1972); *Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976); *Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976); *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976); *Woodson v. North Carolina*, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976); and *Coker v. Georgia*, 433 U.S. 584, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977), held that the death penalty is not invariably cruel and unusual punishment within the meaning of the Eighth Amendment. However, counsel in all good conscience urges this Court to reexamine the issue in light of the current moral standards of our society.

In *Gregg v. Georgia, supra*, this Court stated that:

> "The Eighth Amendment has not been regarded as a static concept. As Mr. Chief Justice Warren said, in an off-quoted phrase, '[t]he Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.' [citations omitted]. Thus, an assessment of contemporary values concerning the infliction of a challenged sanction is relevant to the application of the Eighth Amendment." *Id.*, at pp. 172-173.

Death is the one punishment from which there can be no relief in light of later developments in the law or the evidence. Current assessment of contemporary values concerning the infliction of the death penalty is reflected in the case of *District Attorney v. Watson*, decided by the Massachusetts Supreme Judicial Court on October 28, 1980, and reported in summary form in 49 U.S. Law Week 2322 (November 18, 1980). The Supreme Judicial Court of Massachusetts held that the death penalty, with its full panoply of concomitant physical and mental tortures, is impermissibly cruel in light of contemporary circumstances. The Petitioner would also invite the Court's attention to the concurring opinion in *Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980), where Justice Marshall stated that recent developments, coupled with other persuasive evidence,

> ". . .strongly suggest that Appellate courts are incapable of guaranteeing the kind of objectivity and evenhandedness that the Court contemplated and hoped for in *Gregg*." *Id*, at p. 439.

The Petitioner urges the Court that the punishment of death, for whatever crime and under all circumstances—no matter their substance—is cruel and unusual within the meaning of the Eighth Amendment to the United States Constitution.

II.

THE TENNESSEE DEATH PENALTY ACT IS CONSTITUTIONALLY DEFECTIVE FOR FAILING TO PLACE THE ACCUSED ON NOTICE OF THE STATE'S INTENDED PROOF OF AGGRAVATING CIRCUMSTANCES.

The United States Constitution requires that a Defendant be notified of the charges against him. United States Constitution, Amendments VI and XIV. See *Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977). The purpose of this provision is to insure that a Defendant may know whether the facts and circumstances alleged constitute an indictable offense or not, in order that he may know how to plea, and how to prepare his defense, and that there should be no doubt of the judgment that should be given, if he be convicted. Under Tennessee's Death Penalty Act, the accused is required to defend against proof of "aggravating circumstance" of which he has not been indicted or been given notice of, and which will be used to impose a heavier sentence of death upon him.

The required notice was provided for in the Georgia statute on capital punishment which was upheld in *Gregg v. Georgia, supra*, at p. 153, and was left out of the Tennessee Death Penalty Act. See Georgia Code Annotated, §27-2534 (1973). The Tennessee Death Penalty Act does not provide for notice, nor is the Defendant indicted on, the "aggravating circumstance or circumstances" that will be presented for purposes of enhancing a life sentence to a death sentence.

III.

FAILURE OF THE TENNESSEE DEATH PENALTY ACT TO SUFFICIENTLY DEFINE THE STANDARDS BY WHICH MITIGATING CIRCUMSTANCES ARE TO BE DETERMINED AND WEIGHED AGAINST ANY AGGRAVATING CIRCUMSTANCES RENDERS THE TENNESSEE DEATH PENALTY ACT UN-

CONSTITUTIONAL FOR IMPERMISSIBLE VAGUENESS.

This Court in *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 47 L.Ed.2d 973 (1978), concluded that any constitutional death penalty act must include such provisions as necessary to ensure "a concept of individualized sentencing". *Id.*, at pp. 602-604. The Tennessee Death Penalty Act attempts to allow consideration of the matters discussed in *Lockett*, i.e., "any aspect of a defendant's character or record and any of the circumstances of the offense. . . ." *Id.*, at p. 604. However, the issue now raised is the standard under which the mitigating circumstances are considered by a jury.

Under the Tennessee Death Penalty Act, the state has the initial obligation of proving one or more of the eleven specified aggravating circumstances *beyond a reasonable doubt*. Tennessee Code Annotated, §39-2404(f) (Supp. 1980). However, the jury is instructed pursuant to the act simply to "weigh and consider any mitigating circumstances" and if after an aggravating circumstance is proven beyond a reasonable doubt and "there were no mitigating circumstances sufficiently substantial to outweigh the statutory aggravating circumstance," the penalty is death. Tennessee Code Annotated, §39-2404(f) (Supp. 1980). This language of the death penalty act is impermissibly vague and confusing on the issue this Court now holds most critical, mitigation. The jury is only instructed to "weigh and consider mitigating circumstances" and only if such are "sufficiently substantial to outweigh" a matter proven beyond a reasonable doubt is the death penalty not imposed. The language "weigh and consider", "sufficiently substantial to outweigh", establishes no fair standards by which the mitigating circumstances are to be tested. Indeed, the fair inference is that mitigating circumstances must be proven to a degree higher than "beyond a reasonable doubt" if the jury is given the simple language of the act. The Court's attention is called to the fact that the Ohio statute before the Supreme Court in *Lockett, supra*, established a standard for measuring mitigating circumstances as a "preponderance of the evidence". *Id.*, at p. 607.

The importance of establishing clear standards for the sentencer to follow was re-emphasized in *Godfrey v. Georgia, supra*, at p. 420. The Court states in *Godfrey* that

"If a state wishes to authorize capital punishment it has a

> constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty. Part of the State's responsibility in this regard is to define the crimes for which death may be the sentence in a way that obviates 'standardless [sentencing] discretion.' [citations omitted]. It must channel the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance,' and that 'make rationally reviewable the process for imposing a sentence of death.'" *Id.*, at p. 428.

The importance of "specific and detailed" guidance is of extreme importance in this case as the only aggravating circumstance found by the jury was that the Petitioner had employed another to commit the murder for remuneration. According to the trial judge's report, there was some evidence that one mitigating circumstance was in evidence.

It would be, therefore, respectfully contended by the Petitioner that the failure of the Tennessee Death Penalty Act to sufficiently define the standards by which mitigating circumstances are to be determined and weighed against any aggravating circumstances found renders the Tennessee Death Penalty Act unconstitutional for impermissible vagueness.

IV.

IN DETERMINING THE APPROPRIATENESS OF THE DEATH PENALTY IN A FIRST DEGREE MURDER CASE, A JURY IS NOT REQUIRED TO MAKE SPECIFIC FINDINGS AS TO THE PRESENCE OR ABSENCE OF MITIGATING CIRCUMSTANCES. THEREFORE, THE SUPREME COURT OF TENNESSEE IS REQUIRED TO PRESUME CERTAIN FINDINGS AS TO THE PRESENCE OR ABSENCE OF MITIGATING CIRCUMSTANCES. SUCH PRESUMPTIONS ARE CONSTITUTIONALLY UNSOUND.

This court has stated that:

> "Since the State must administer its capital-sentencing procedures with an even hand, see *Proffitt v. Florida*, 428 U.S. at 250, 49 L.Ed.2d 913, 96 S.Ct. 2960, it is important

> that the record on appeal disclose to the reviewing court the considerations which motivated the death sentence in every case in which it is imposed. Without full disclosure of the basis for the death sentence, the Florida capital-sentencing procedure would be subject to the defects which resulted in the holding of unconstitutionality in *Furman v. Georgia.*" *Gardner v. Florida, supra*, at p. 361.

The Tennessee Death Penalty Act makes no requirement that a jury make findings as to the presence or absence of mitigating circumstances. The only findings in this respect is that the jury "signify that there were no mitigating circumstances sufficiently substantial to outweigh the statutory aggravating circumstance or circumstances so found." Tennessee Code Annotated §39-2404(g). The jury must make specific findings with respect to any aggravating circumstances found and reduce those findings to writing. Tennessee Code Annotated §39-2404(g). In *Presnell v. Georgia*, 439 U.S. 14, 99 S.Ct. 235, 53 L.Ed.2d 207 (1973), the Supreme Court of the United States held that it is improper for a court which is reviewing a death sentence to presume certain findings merely "from evidence in the record." Because the Tennessee Death Penalty Act does not require specific findings as to the presence or absence of mitigating circumstances, the Supreme Court of Tennessee is required to presume certain findings in that respect. The Petitioner would submit that such presumptions are constitutionally unsound under the principle set out in *Presnell, supra.*

V.

THE TENNESSEE DEATH PENALTY ACT IS UNCONSTITUTIONAL BY ALLOWING THE INTRODUCTION OF EVIDENCE AGAINST THE DEFENDANT WHICH IS OTHERWISE INADMISSIBLE UNDER THE RULES OF EVIDENCE.

Tennessee Code Annotated §39-2404(c) provides that:

> "In the sentencing proceeding, the trial court is allowed to admit into evidence any such evidence which the court deems to have probative value on the issue of punishment regardless of its admissibility under the Rules of Evidence, provided that the Defendant is accorded a fair

opportunity to rebut any hearsay statements so admitted."

The range of material that would be available against a defendant would run from hearsay, speculation, conclusion, opinion, rumor to gossip. Each category presents its own unique problems but weighed together the prejudicial effect is overwhelming to a defendant. This Court has noted that although undue restrictions should not be imposed on the evidence offered, the Defendant must not be prejudiced. *Gregg v. Georgia, supra,* at pp. 203-204. The Petitioner would respectfully contend that the admission of hearsay and the composite weight of other evidence not admissible under the Rules of Evidence is unconstitutional. The prejudice is even more heightened due to the lack of notice of the intended offer of proof previously discussed in this Petition.

VI.

THE TENNESSEE DEATH PENALTY STATUTE IS UNCONSTITUTIONAL AS VIOLATIVE OF DOUBLE JEOPARDY.

The Tennessee Death Penalty Act appears to be reasonably subject to the argument that the proceedings are not a bifurcation of one prosecution but two criminal proceedings. The Act appears to establish a new crime of "aggravated homicide." If the statute creates such a new crime, the conviction and automatic life sentence ends the first proceeding and what follows presents a violation of the double jeopardy provision of the United States Constitution, Amendments V and XIV.

The Petitioner would contend that the required "proof beyond a reasonable doubt" of the additional fact of an "aggravating circumstance or circumstances" creates a crime distinct and separate from first degree murder just as effectively as does the required "proof beyond a reasonable doubt" of "premeditation" creates first degree murder as a distinct and separate crime from second degree murder. In fact, the crime of "aggravated murder in the first degree" is very similar in form to the crime of "aggravated assault" also enacted in 1977 by the Tennessee Legislature. Tennessee Code Annotated §39-601 (Supp. 1980). This creation of a separate crime of "aggravated first degree murder," which would have to be considered a greater offense to first degree murder, poses a serious double jeopardy problem, and conviction of the lesser included of-

fense of first degree murder serves as an acquittal of the higher offense of "aggravated first degree murder." Cf. *Robinson v. Neil*, 366 F. Supp. 924, 927 (D.C. Tenn. 1973); *Benton v. Maryland*, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969).

VII.

THE MECHANISM INSTITUTED BY THE TENNESSEE LEGISLATURE AND THE SUPREME COURT OF TENNESSEE TO PROVIDE PROPORTIONALITY REVIEW FAILS TO ASSURE THAT CAPITAL-SENTENCING PROCEDURES WILL BE ADMINISTERED IN AN EVEN-HANDED MANNER.

Tennessee Code Annotated §39-2406(2) provides that "[w]henever the death penalty is imposed for murder in the first degree. . . , the defendant shall have the right of direct appeal from the trial court to the Tennessee Supreme Court,. . . ." As part of the Court's duty in reviewing cases wherein the death penalty is imposed, the Court must determine whether

> "the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the nature of the crime, and the defendant. The Tennessee Supreme Court may promulgate rules as it deems appropriate to establish such procedures as are necessary to enable it to properly review the death sentence." Tennessee Code Annotated §39-2406(c).

Pursuant to Tennessee Code Annotated §39-2406(c), the Supreme Court adopted Rule 47 (now found at Rule 12 of the Rules of the Supreme Court of Tennessee which were effective January 28, 1981) which requires trial judges to submit a report in criminal trials for murder in the first degree. Rule 47 places the responsibility on the trial judge to compile all information required by that Rule. Evidently this is the mechanism by which the Supreme Court is to determine whether or not any particular sentence of death is "excessive or disproportionate." A copy of the Rule 47 report filed in the Petitioner's case can be found in the Appendix at A-6.

The mechanism for assuring proportionality review established by the Legislature and this Court is materially different from Georgia's mechanism approved by this Court in *Gregg v. Georgia, supra*, at p. 153. The Georgia statute requires trial judges in capital-

sentencing cases to submit a report to the Georgia Supreme Court. This is essentially what the Rule 47 is designed to do. However, the Georgia legislature went further and established the post of the Assistant to the Supreme Court to "accumulate the records of all capital felony cases in which sentence was imposed after January 1, 1970, or such earlier date as the Court may deem appropriate." Georgia Code Annotated §27-2537(f). The Georgia Supreme Court is authorized to employ a staff and to employ such methods to compile data relevant to statutory questions concerning the validity of the death sentence. The Georgia Legislature also authorizes consideration of capital felony cases wherein sentence was imposed before the effective date of the statute. The Georgia statute also requires the Supreme Court to include in its decision a reference to "those similar cases which it took into consideration." Georgia Code Annotated §27-2537(e).

Tennessee Code Annotated §2406(c) also requires the Court to determine whether "the sentence of death is excessive or disproportionate to the penalty imposed in similar cases. . . ." However, the only step taken to assure proportionality review is that taken in Rule 47. Unlike its Georgia counterpart, Rule 47 makes no provision for a process by which the Court can gather information and develop an adequate factual basis in order to determine whether, in any given case, the "sentence of death is excessive or disproportionate to the penalty imposed in similar cases."

The Petitioner would respectfully submit that the Rule 47 mechanism is not adequate to assure that the sentence of death is not excessive or disproportionate. It has come to counsel's attention that Rule 47 reports have not been filed in all first-degree murder cases. Moreover, the Rule 47 reports themselves provide inconsistent, incomplete information concerning the cases they pertain to, for the reports do not even require trial judges to provide complete summaries of the relevant facts. There is no mechanism—as in the Georgia judicial system—for comprehensive data collection so as to develop a factual base for conducting proportionality review. The responsibility placed on reviewing courts by the constitutional requiements of *Furman v. Georgia, supra,* and *Gregg v. Georgia, supra,* require a better data collecting mechanism. Moreover, what has been needed from the inception of Tennessee's Death Penalty Act is an initial fact-finding procedure so as to develop a factual basis for

conducting proportionality review for the initial cases tried under the statute. Counsel would point out that the Petitioner was one of the first Defendants tried under the Tennessee Death Penalty Act. This initial fact-finding procedure may require the use of *pre-Furman* cases in its comparative examination because of the absence of an adequate number of *post-Furman* cases. See *Gregg v. Georgia, supra,* at p. 204 n. 56.

The Tennessee Legislature intentionally placed the duty of assuring proportionality review with the Supreme Court of Tennessee. The legislature chose not to adopt a scheme like Georgia's, but instead it has authorized the Supreme Court to "promulgate rules as it deems appropriate to establish such procedures as are necessary to enable it to properly review the death sentence." Tennessee Code Annotated §39-2406(c). The Petitioner respectfully submits that not enough has been done to assure proportionality review. "Where life itself is what hangs in the balance, a fine precision in the process must be insisted upon." *Locket v. Ohio, supra,* at p. 620.

CONCLUSION

The Petitioner respectfully asks this most Honorable Court of the United States to grant his Petition for Writ of Certiorari to the Supreme Court of Tennessee. Counsel is aware of the fact that the Court is burdened with a heavy case load and that the Court's time is precious. However, as stated at the outset, it is the opinion of the Petitioner, through his counsel, that questions of Constitutional law are presented by this Petition which are of paramount interest and importance.

COUNSEL FOR PETITIONER:

GLANKLER, BROWN, GILLILAND,
CHASE, ROBINSON & RAINES

By: s/
Frank J. Glankler, Jr.

By: s/
Jimmy Neal Raines

By: s/
C. Barry Ward

NO. _____
IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

RICHARD HALE AUSTIN
Petitioner,
v.
STATE OF TENNESSEE,
Respondent.

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of September, 1981, three copies of this Petition for Writ of Certiorari to the Supreme Court of Tennessee were served upon the following party to this cause by placing said copies in the United States Mail, first-class postage prepaid: The Honorable William M. Leech, Jr., Attorney General of the State of Tennessee, 450 James Robertson Parkway, Nashville, Tennessee 37129.

s/
JIMMY NEAL RAINES

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IN THE SUPREME COURT OF TENNESSEE
AT JACKSON
For Publication May 26, 1981

STATE OF TENNESSEE)
Plaintiff-Appellee,)
)
vs.)
)
RICHARD HALE AUSTIN)
Defendant-Appellant.)
)

Shelby Criminal No. 1
Hon. James C. Beasley, Judge

For Plaintiff-Appellee:

William M. Leech, Jr.
Attorney General

Robert L. Jolley, Jr.
Assistant Attorney General

For Defendant-Appellant:

Frank J. Glankler, Jr.
J. N. Raines
C. Barry Ward
(Memphis, Tennessee)

O P I N I O N

AFFIRMED HARBISON, C.J.

Appellant appeals from his conviction as accessory before the fact to murder in the first degree. Following the bifurcated trial procedures set out in the controlling Tennessee statutes, the jury imposed the death penalty. The trial judge concurred, finding the sentence appropriate under the facts.

Appellant was convicted of employing an escaped convict to kill one Julian Watkins, an undercover agent for the Memphis police vice squad, as the result of whose activities indictments had been returned against appellant and a number of his employees and associates in an illegal gambling operation. Watkins was to be the principal witness for the prosecution against appellant and his codefendants.

Counsel for appellant have argued only briefly an issue of the insufficiency of the evidence. The record reveals that there was abundant material evidence to support the finding of the jury, concurred in by the trial judge, that appellant did in fact employ and pay a substantial sum of money to Charles Blankenship, an escaped convict, to gun down and execute in gangland fashion Julian Watkins at the latter's place of business. The scheme was carried out as planned and the assassin was paid as agreed.

The principal issues raised by appellate counsel (who were not trial counsel for appellant) involve the constitutionality of the Tennessee statutes authorizing the imposition of the death penalty for murder in the first degree and accessory before the fact of that crime. Although we will discuss these issues briefly, they have been considered and decided adversely to the contentions of appellant in other cases recently decided by this Court.[1]

Although there was conflicting evidence at the trial as to some issues, it was undisputed that Jack Charles Blankenship, accompanied by Terry Lee Casteel, went to the automobile body repair shop operated by Julian Watkins on the morning of May 23, 1977. Blankenship requested Watkins to come outside and give an estimate for some allegedly needed repairs. He then shot Watkins four times, fatally wounding him, re-entered his automobile and left at a high rate of speed.

Casteel testified that he had been employed by appellant, Richard Austin, to operate an establishment known as the "Golden Cue." Members of the Memphis vice squad suspected that illegal gambling operations were being conducted at the Golden Cue. They

employed the decedent, Julian Watkins, a reserve deputy sheriff, to engage in an undercover operation at this establishment from January 1977 until April. During that time Watkins went to the Golden Cue on a number of occasions, observed appellant and a number of his employees, including Casteel, and reported that illegal gambling was in fact being conducted. Ten indictments were obtained on the basis of the testimony of Watkins, and arrest warrants were served on appellant and several of his employees on April 20. Watkins accompanied the arresting officers and identified the persons named in the warrants. Not all of these people were present on that occasion, however, and on Wednesday, May 18, 1977, Watkins returned with officer Thomas Beach to assist him in serving other individuals who had been indicted. Appellant engaged in a conversation with Watkins at that time and ascertained that the latter would be at his body repair shop on the following Monday, May 23.

Casteel testified that he and appellant met with Charles Blankenship, who had escaped from a correctional institution in Shelby County, and that appellant had a conversation with Blankenship. Later appellant directed Casteel to take Blankenship to Watkins' home. He did so on the evening of Sunday, May 22, but Watkins was not at his residence. Casteel then took Blankenship to a trailer owned by appellant and his wife just over the state line of Mississippi. On the morning of May 23 he and appellant went to the trailer, and Casteel then accompanied Blankenship to Watkins' place of business, where the murder occurred. Casteel was indicted in the present case. However, his trial was severed and he testified as a key witness for the State.

Blankenship was seen by a number of witnesses during the day of May 23, following the homicide, and he displayed large sums of money to several of them. He was arrested early on the morning of May 24, 1977. Subsequently he plead guilty to murder in the first degree and received a sentence of life imprisonment. He was not called as a witness by either side in the trial of the present case.

Appellant denied any knowledge of the employment of Blankenship to murder Watkins and attempted to establish that his estranged wife had employed Casteel to concoct the scheme. Casteel denied this, and Mrs. Austin was not called as a witness at the trial. A number of other witnesses, employees of appellant, testified that

business at appellant's establishment declined drastically after indictments were returned and arrests made in April, and that appellant on several occasions stated that he would like to see Julian Watkins killed. There was also testimony that appellant subsequently attempted to intimidate witnesses for the State and prevent their testifying in this case.

After finding appellant guilty in the initial phase of the trial, the jury heard some additional evidence offered by the State at the sentencing phase. Appellant offered no testimony during that portion of the trial. In imposing the death penalty the jury found that the evidence established as an aggravating circumstance that the appellant had either committed the murder for remuneration or promise of remuneration, or had employed another to commit the murder for remuneration or promise thereof, T.C.A. §39-2404(i)(4). The jury found no mitigating circumstances to outweigh this, and our examination of the record establishes that the finding of the jury was fully supported by abundant material evidence.

The trail was a lengthy and hard-fought one, and classic issues for determination by the jury were presented. Although they returned a verdict using the statutory language respecting the aggravating circumstances above referred to, there can be no question but that they found that appellant had deliberately and willfully employed another person and paid him to murder Julian Watkins, thereby eliminating the only witness who could have testified in support of the pending indictments against appellant and his employees for conducting an illegal gambling operation. The issue regarding insufficiency of the evidence is without merit and is overruled.

As previously stated, all of the other issues raised by appellant have been considered in depth by the Court in other cases and found to be without merit. It is first argued on behalf of appellant that the death penalty is violative of the provisions of the United States Constitution and those of the state constitution regarding cruel and unusual punishment. This Court has expressly held to the contrary on numerous occasions and the issue does not warrant further discussion here. See Houston v. State, 593 S.W.2d 267, 276 (Tenn. 1980), cert. denied, 101 S.Ct. 251 (1980); Cozzolino v. State, 584 S.W.2d 765, 767 (Tenn. 1979). The decision as to whether this state will or will not have a death penalty for murder in the first degree is one to be made by the legislative branch of government, not the

judiciary. In the opinion of the majority, there is nothing in either the state or the federal constitution, historically or otherwise, which precludes the imposition of the death penalty in accordance with the procedures and under the circumstances provided for in the present statutes of this state.

In the second issue presented, appellant insists that the Tennessee statutes are unconstitutional because they do not require that the accused be placed on notice, in advance, of the state's intended proof of aggravating circumstances. This issue was considered and decided adversely to the insistence of appellant in State v. Berry, 592 S.W.2d 553, 562 (Tenn. 1980).

In their third issue counsel insist that the Tennessee statutes are constitutionally defective by requiring a mandatory sentence. This and related issues were considered in detail in State v. Dicks, released February 2, 1981, and found to be without merit.

In their fourth issue counsel insist that the imposition of death in this case is disproportionate inasmuch as Blankenship received only a life sentence while appellant received that of death. We are unable to sustain this contention. The jury in the present case were fully apprised of the fact that Blankenship had plead guilty and had received a life sentence upon a plea bargain. The proof which was presented to the sentencing court or jury in the Blankenship case, however, was not before the present jury, nor was Blankenship called as a witness. The jurors in the present case had before them convincing evidence that appellant in cold blood, in order to eliminate a witness against him, hired an assassin and paid him a substantial sum to take the life of Julian Watkins. The fact that appellant himself did not pull the trigger or personally commit the homicide does not render the sentence of death against his disproportionate.

A similar contention was considered by the Court in the cases of State v. Groseclose and Rickman, released February 17, 1981. There a husband hired two individuals to kill his wife and to make the homicide appear to have been incident to rape and robbery. He and one of the assassins received the death penalty; a younger less experienced defendant who freely admitted his guilt and cooperated with law enforcement officials was given a life sentence. The death penalty was not found to be disproportionate or arbitrary in that case, nor do we find it to be so in the present case.

It is further urged on behalf of appellant that the death penalty

statutes in Tennessee are impermissibly vague. This contention and a similar argument were dealt with in detail by the Court in State v. Dicks, supra. There the burden of proof and the statutory procedures involved in the imposition of the death penalty were delineated and sustained. We find it unnecessary to repeat that discussion here. Likewise we find without merit the sixth issue raised by appellant to the effect that the Tennessee statutes permit the introduction of inadmissible evidence in the sentencing phase. No such evidence was offered or suggested in the present case, and the statute is certainly not unconstitutional on its face in this regard. Equally without merit is the insistence that the bifurcated trial procedures are violative of the double jeopardy provisions of the state and federal constitutions. The sentencing phase of the trial is concerned only with the punishment and does not in any sense constitute a second trial for the same offense or create a separate and additional offense.

All of the assignments of error have been carefully considered as has the evidentiary record. We find no reversible error in the trial proceedings and accordingly affirm the judgment, both as to the conviction and the punishment. Costs are assessed to appellant. The sentence will be executed as provided by law on Thursday, October 1, 1981, unless stayed or otherwise directed by further orders of this Court or other proper authority.

I am authorized to state that Justice Brock concurs in the affirmance of conviction but dissents from the imposition of the death penalty for the reasons expressed in his dissent in State of Tennessee v. Jeffrey Stuart Dicks.

s/

William J. Harbison, C.J.

Fones and Cooper, JJ., concur;
Brock, J., dissents.

[1]Although the instant case was submitted to the Court earlier than some of the other reported decisions herein referred to, in the course of regular assignment and release of opinions the decisions in those cases were released earlier. In one of the first decisions in which this Court approved the imposition of the death penalty under present statutes, Houston v. State, 593 S.W.2d 256 (Tenn. 1980), cert. denied, 101 S.Ct. 251 (1980), review was sought in the United States Supreme

Court. That review was not completed until December 1980. This Court deemed it prudent not to release further opinions approving the imposition of the death penalty pending that review. Subsequently Justice Brock, to whom the record in the present case was initially assigned, concluded that imposition of the death penalty under any circumstances violated provisions of the Tennessee Constitution. See his dissenting opinion in the case of State v. Dicks, released February 2, 1981. Thereafter the undersigned was designated to prepare the opinion of the Court in the present case.

IN THE SUPREME COURT OF TENNESSEE
AT JACKSON

STATE OF TENNESSEE	)
Plaintiff-Appellee,	)
	)
vs.	)
	)
RICHARD HALE AUSTIN	)
Defendant-Appellant.	)
	)

July 27, 1981
For Publication

Shelby Criminal No. 1

ORDER

A petition for rehearing has been filed on behalf of appellant. After consideration of same, the Court is of the opinion that the petition is not well taken, and the same is accordingly denied. The Court does not find the death penalty in this case disproportionate, in view of the deliberate and premeditated actions of appellant in paying another to take the life of the only witness against appellant in pending criminal proceedings. As pointed out in the original opinion, similar conduct was held to merit the death penalty in the case of State v. William Edward Groseclose, 615 S.W.2d 142 (Tenn. 1981).

The petition is denied at the cost of appellant. Justice Brock adhers to the views stated in the original opinion with respect to the death penalty.

s/
William J. Harbison, C.J.

Fones and Cooper, JJ., concur.
Brock, J., dissents.

Punishment for murder in first degree — Sentencing proceeding — New trial.—(1) Upon a trial for murder in the first degree, should the jury find the defendant guilty of murder in the first degree, they shall not fix punishment as part of their verdict, but the jury shall fix the punishment in a separate sentencing hearing to determine whether the defendant shall be sentenced to death or life imprisonment. The separate sentencing hearing shall be conducted as soon as practicable before the same jury that determined guilt, subject to the provisions of subsection (k) relating to certain retrials on punishment.

(b) In the sentencing proceeding, the attorney for the state shall be allowed to make an opening statement to the jury and then the attorney for the defendant shall also be allowed such statement, provided that the waiver of opening statement by one party shall not preclude the opening statement by the other party.

(c) In the sentencing proceeding, evidence may be presented as to any matter that the court deems relevant to the punishment and may include, but not be limited to, the nature and circumstances of the crime; the defendant's character, background history, and physical condition; any evidence tending to establish or rebut the aggravating circumstances enumerated in subsection (i) below; and any evidence tending to establish or rebut any mitigating factors. Any such evidence which the court deems to have probative value on the issue of punishment may be received regardless of its admissibility under the rules of evidence, provided that the defendant is accorded a fair opportunity to rebut any hearsay statements so admitted. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or of the state of Tennessee.

(d) In the sentencing proceeding, the state shall be allowed to make a closing argument to the jury; and then the attorney for the defendant shall also be allowed such argument, with the state having the right of closing.

(e) After closing arguments in the sentencing hearing, the trial judge shall include in his instructions for the jury to weigh and consider any mitigating circumstances and any of the statutory aggravating circumstances set forth in subsection (i) of this section

which may be raised by the evidence at either the guilt or sentencing hearing, or both. These instructions and the manner of arriving at a sentence shall be given in the oral charge and in writing to the jury for its deliberations.

(f) If the jury unanimously determines that no statutory aggravating circumstances have been proved by the state beyond a reasonable doubt, or if the jury unanimously determines that a statutory aggravating circumstance or circumstances have been proved by the state beyond a reasonable doubt but that said circumstance or circumstances are outweighed by one or more mitigating circumstances, the sentence shall be life imprisonment. The jury shall then return its verdict to the judge upon a form provided by the court which may appear substantially as follows:

PUNISHMENT OF LIFE IMPRISONMENT

(1) We, the jury, unanimously find that the punishment shall be life imprisonment.

/s/ _____ Jury Foreman	/s/ _____ Juror
/s/ _____ Juror	/s/ _____ Juror
/s/ _____ Juror	/s/ _____ Juror
/s/ _____ Juror	/s/ _____ Juror
/s/ _____ Juror	/s/ _____ Juror
/s/ _____ Juror	/s/ _____ Juror

(g) If the jury unanimously determines that at least one statutory aggravating circumstance or several statutory aggravating cir-

cumstances have been proved by the state beyond a reasonable doubt, and said circumstance or circumstances are not outweighted by any mitigating circumstances, the sentence shall be death. If the death penalty is the sentence of the jury, the jury shall (1) reduce to writing the statutory aggravating circumstance or statutory aggravating circumstances so found and (2) signify that there were no mitigating circumstances sufficiently substantial to outweigh the statutory aggravating circumstance or circumstances so found. These findings and verdict shall be returned to the judge upon a form provided by the court which may appear substantially as follows:

PUNISHMENT OF DEATH

(1) We, the jury, unanimously find the following listed statutory aggravating circumstance or circumstances:

[Here list the statutory aggravating circumstance or circumstances so found]

(2) We, the jury, unanimously find that there are no mitigating circumstances sufficiently substantial to outweigh the statutory aggravating circumstance or circumstances so listed above.

(3) Therefore, we the jury, unanimously find that the punishment shall be death.

/s/ _____ Jury Foreman	/s/ _____ Juror
/s/ _____ Juror	/s/ _____ Juror
/s/ _____ Juror	/s/ _____ Juror
/s/ _____ Juror	/s/ _____ Juror
/s/ _____ Juror	/s/ _____ Juror
/s/ _____ Juror	/s/ _____ Juror

(h) If the jury cannot ultimately agree as to punishment, the judge shall dismiss the jury and the judge shall impose a sentence of life imprisonment. The judge shall not instruct the jury, nor shall the attorneys be permitted to comment at any time to the jury, on the effect of the jury's failure to agree on a punishment.

(i) No death penalty shall be imposed but upon a unanimous finding, as heretofore indicated, of the existence of one or more of the statutory aggravating circumstances, which shall be limited to the following:

(1) The murder was committed against a person less than twelve years of age and the defendant was eighteen years of age, or older.

(2) The defendant was previously convicted of one or more felonies, other than the present charge, which involve the use or threat of violence to the person.

(3) The defendant knowingly created a great risk of death to two or more persons, other than the victim murdered, during his act of murder.

(4) The defendant committed the murder for remuneration or the promise of remuneration, or employed another to commit the murder for remuneration or the promise of remuneration.

(5) The murder was especially heinous, atrocious, or cruel in that in involved torture or depravity of mind.

(6) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or prosecution of the defendant or another.

(7) The murder was committed while the defendant was engaged in committing, or was an accomplice of, or was attempting to commit, or was fleeing after committing or attempting to commit, any first degree murder, arson, rape, robbery, burglary, larceny, kidnapping, aircraft piracy, or unlawful throwing, placing or discharging of a destructive device or bomb.

(8) The murder was committed by the defendant while he was in lawful custody or in a place of lawful confinement or during his escape from lawful custody or from a place of lawful confinement.

(9) The murder was committed against any peace officer, corrections official, corrections employee or fireman, who was engaged in the performance of his duties, and the defendant knew or reasonably should have known that such victim was a peace officer, corrections official, corrections employee or fireman, engaged in the

performance of his duties.

(10) The murder was committed against any present or former judge, district attorney general or state attorney general, assistant district attorney general or assistant state attorney general due to or because of the exercise of his official duty or status and the defendant knew that the victim occupied said office.

(11) The murder was committed against a national, state, or local popularly elected official, due to or because of the official's lawful duties or status, and the defendant knew that the victim was such an official.

(j) In arriving at the punishment the jury shall consider, as heretofore indicated, any mitigating circumstances which shall include, but not be limited to the following:

(1) The defendant has no significant history of prior criminal activity;

(2) The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance;

(3) The victim was a participant in the defendant's conduct or consented to the act;

(4) The murder was committed under circumstances which the defendant reasonably believed to provide a moral justification for his conduct;

(5) The defendant was an accomplice in the murder committed by another person and the defendant's participation was relatively minor;

(6) The defendant acted under extreme duress or under the substantial domination of another person;

(7) The youth or advanced age of the defendant at the time of the crime;

(8) The capacity of the defendant to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law was substantially impaired as a result of mental disease or defect or intoxication which was insufficient to establish a defense to the crime but which substantially affected his judgment.

(k) Upon motion for a new trial, after a conviction of first degree murder, if the court finds error in the trial determining guilt, a new trial on both guilt and sentencing shall be held, but if the court finds error alone in the trial determining punishment, a new trial on the issue of punishment alone shall be held by a new jury empanelled

for said purpose. In the event that the trial court, or any other court with jurisdiction to do so, orders that a defendant convicted of first degree murder (whether the sentence is death or life imprisonment) be granted a new trial, either as to guilt or punishment or both, said new trial shall include the possible punishments of death or life imprisonment. [Code 1858, §4600 (deriv. Acts 1829, ch. 23, §3); Shan., §6441; Code 1932, §10770; Acts 1977, ch. 51, §2.]

Tennessee Code Annotated §39-2406

Death sentence — Appeal — Automatic review by Supreme Court — Automatic life sentence when death sentence precluded.—(a) Whenever death penalty is imposed for murder in the first degree and upon the judgment becoming final in the trial court, the defendant shall have the right of direct appeal from the trial court to the Tennessee Supreme Court, which shall have exclusive appellate jurisdiction, provided that the sentence of death shall be automatically reviewed by the Tennessee Supreme Court and said sentence review shall be consolidated for consideration with the direct appeal, if prayed for. If the defendant has been convicted of first degree murder and sentenced to death and appeals that conviction and sentence, the record as to guilt and sentence shall be expeditiously filed with the Tennessee Supreme Court within the time limit provisions of §§27-111 and 27-322. If the defendant has been convicted of first degree murder and sentenced to death but does not appeal the conviction of first degree murder, then the trial judge shall certify, within ninety days after the judgment has become final, the record relating to punishment and the same shall be transmitted by the clerk of the trial court to the Tennessee Supreme Court. If the defendant has been convicted of other crimes at the same trial wherein a death sentence is imposed, the Tennessee Supreme Court shall have authority to review by direct appeal such other crimes if appealed by the defendant with the conviction of first degree murder and sentence of death.

(b) The appeal of the conviction of first degree murder and the review of the sentence of death shall have priority over all other cases and shall be heard according to rules promulgated by the Tennessee Supreme Court. The Tennessee Supreme Court shall first consider any errors assigned and then the court shall review the sentence of death.

(c) In reviewing the sentence of death for murder in the first degree, the Tennessee Supreme Court shall determine whether (1) the sentence of death was imposed in any arbitrary fashion; (2) the evidence supports the jury's findings of a statutory aggravating circumstance or statutory aggravating circumstances; (3) the evidence supports the jury's finding of the absence of any mitigating circumstances sufficiently substantial to outweigh the aggravating circumstance or circumstances so found; and (4) the sentence of death

is excessive or disproportionate to the penalty imposed in similar cases, considering both the nature of the crime and the defendant. The Tennessee Supreme Court may promulgate rules as it deems appropriate to establish such procedures as are necessary to enable it to properly review the death sentence.

(d) In addition to its other authority regarding correction of errors, the Tennessee Supreme Court, in reviewing the death sentence for murder in the first degree, is authorized to (1) affirm the sentence of death; or (2) modify the punishment to life imprisonment.

(e) In the event that any provision of §§39-2402, 39-2404, 39-2405, 39-2407 or this section or the application thereof to any individual or circumstance is held to be invalid or unconstitutional by the Tennessee Supreme Court or a federal court, so as permanently to preclude a sentence of death as to that individual, the court having jurisdiction over such individual previously sentenced to death shall cause such individual to be brought before the proper court which shall sentence such person to imprisonment for life. [Acts 1919, ch. 5, §1; Shan. Supp., §6442a1; Code 1932, §10772; Acts 1973, ch. 192, §2; 1974 (Adj. S.), ch. 462, §3; 1977, ch. 51, §§4, 6.]

IN THE CRIMINAL COURT OF
SHELBY COUNTY, TENNESSEE
DIVISION SIX

STATE OF TENNESSEE,
V.
RICHARD AUSTIN,
Defendant.
NO. B-58357

MOTION FOR NEW TRIAL

TO THE HONORABLE JAMES C. BEASLEY, JUDGE OF DIVISION SIX OF THE CRIMINAL COURT OF SHELBY COUNTY, TENNESSEE:

Comes now the Defendant, Richard H. Austin, and moves the Court to set aside and vacate the verdict of the Jury and the Judgment of the Court thereon, and grant him a new trial in this Cause, upon the following grounds and each of them:

1. That the evidence is not sufficient to sustain the verdict, and that it preponderates against the verdict and in favor of the innocence of the Defendant.
2. That the verdict is contrary to the law and the evidence in this Cause.
3. That the Tennessee Law under which the Defendant was tried and convicted, enacted by the General Assembly of the State of Tennessee at its 1977 Session is contrary to the Constitutions of the State of Tennessee and the United States of America.

WHEREFORE, THE DEFENDANT MOVES THE COURT TO SET ASIDE AND VACATE THE VERDICT OF THE JURY AND THE JUDGMENT OF THE COURT THEREON, AND TO GRANT HIM A NEW TRIAL IN THIS CAUSE.

s/
ROBERT I. LIVINGSTON,
ATTORNEY FOR THE
DEFENDANT,
RICHARD AUSTIN.

CERTIFICATE

I, Robert I. Livingston, Attorney for the Defendant, do hereby certify that a copy of the foregoing Motion has been furnished the District Attorney General of Shelby County, Tennessee, by personally delivering same to his office at 157 Poplar Avenue, Memphis, Shelby County, Tennessee, this 9th day of November, 1977.

s/

ROBERT I. LIVINGSTON,
ATTORNEY FOR THE
DEFENDANT,
RICHARD AUSTIN.

REPORT OF TRIAL JUDGE: CAPITAL CASES*

IN THE CRIMINAL COURT OF SHELBY COUNTY

STATE OF TENNESSEE

v.

RICHARD HALE AUSTIN
(defendant)

Case No. B58357

Sentence of Death [X]
or
Life Imprisonment [ ]

A. DATA CONCERNING DEFENDANT

1. Name Austin Richard Hale 2. 6/8/39
last first middle mo./day/yr.

3. Sex: M [X] 4. Marital Status: Never Married [ ];
F [ ] Married [X];Divorced [ ];
Spouse Deceased [ ].

5. Children: Number of Children None
Ages of Children: 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, Over 18 (Circle age of each child)

6. Father Living: Yes [X] No [ ]

7. Mother Living: Yes [X] No [ ]

8. Education: Highest Grade Completed: (Circle one)
1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, (12), 13, 14, 15, 16, 17, 18, 19

9. Intelligence Level: [ ] Low (IQ below 70)
[ ] Medium (IQ 70 to 100)
[X] High (IQ above 100)

*A separate report must be submitted for each defendant tried under T.C.A. 39-2402 as amended by Ch. 51, Public Acts of 1977.

10. Was a psychiatric evaluation performed? [ ] Yes [X] No

If performed, is defendant:

a. Able to know wrongfulness of his acts?
[ ] Yes [ ] No
b. Able to conform his conduct to the law?
[ ] Yes [ ] No
c. Able to cooperate intelligently in own defense?
[ ] Yes [ ] No

11. If examined, were character or behavior disorders found?

[ ] Yes [ ] No

If yes, please explain. _____

_____

_____

12. What other pertinent psychiatric (and psychological) information was found? _____

_____

_____

13. Prior Work Record of Defendant:

	Type Job	Pay	Dates Held	Reason for Termination
a.	Amusement Center Owner	Varied	All Adult Life	Imprisonment
b.				
c.				
d.				
e.				

14. List any noteworthy physical characteristics of the defendant.

Heart condition

15. Defendant's Military History: None

B. DATA CONCERNING TRIAL

1. Was the guilt determined with or without jury?

With [X] Without [ ]

2. How did defendant plead? Guilty [ ] Not Guilty [X]

3. What sentence was imposed?

Death [X] Life Imprisonment [ ] Other _____

_____

C. OFFENSE RELATED DATA

1. Were other offenses tried in the same trial?

Yes [ ] No [X]

If yes, list the offenses: _____

_____

_____

_____

2. If tried with jury, did the jury recommend the death penalty?

Yes [X] No [ ]

3. Statutory aggravating circumstances found:

Yes [X] No [ ]

4. Which of the following statutory aggravating circumstances were instructed, and which were found?

	Instructed	Found
(a) The murder was committed against a person less than twelve years of age and the defendant was eighteen years of age, or older.	[X]	[ ]

(b)	The defendant was previously convicted of one or more felonies, other than the present charge, which involve the use or threat of violence to the person.	[X]	[ ]
(c)	The defendant knowingly created a great risk of death to two or more persons, other than the victim murdered, during his act of murder.	[X]	[ ]
(d)	The defendant committed the murder for remuneration or the promise of remuneration, or employed another to commit the murder for remuneration or the promise or remuneration.	[X]	[ ]
(e)	The murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind.	[X]	[ ]
(f)	The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or prosecution of the defendant or another.	[X]	[ ]
(g)	The murder was committed while the defendant was engaged in committing, or was an accomplice in the commission of, or was	[X]	[ ]

attempting to commit, or was fleeing after committing, or attempting to commit, any first degree murder, arson, rape, robbery, burglary, larceny, kidnapping, aircraft piracy, or unlawful throwing, placing or discharging of a destructive device or bomb.

(h) The murder was committed by the defendant while he was in lawful custody or in a place of lawful confinement or during his escape from lawful custody or from a place of lawful confinement. [X] [ ]

(i) The murder was committed against any peace officer, corrections official, corrections employee or fireman, who was engaged in the performance of his duties, and the defendant knew or reasonably should have known that such victim was a peace officer, corrections official, corrections employee or fireman, engaged in the performance of his duties. [X] [ ]

(j) The murder was committed against any present or former judge, district attorney general or state attorney general, assistant district attorney general or [X] [ ]

assistant state attorney general due to or because of the exercise of his official duty or status and the defendant knew that the victim occupies or occupies said office.

(k) The murder was committed against a national, state, or local popularly elected official, due to or because of the official's lawful duties or status, and the defendant knew that the victim was such an official. [X] [ ]

[T.C.A. 39-2404, as amended by Ch. 51(2), Public Acts of 1977]

5. Were mitigating circumstances in evidence?

Yes [ ] No [X]

6. Which mitigating circumstances were in evidence?

	Yes	No
(a) The defendant has no significant history of prior criminal activity;	[ ]	[X]
(b) The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance;	[ ]	[ ] possible
(c) The victim was a participant in the defendant's conduct or consented to the act;	[ ]	[X]

(d) The murder was committed under circumstances which the defendant reasonably believed to provide a moral justification for his conduct; [ ] [X]

(e) The defendant was an accomplice in the murder committed by another person and the defendant's participation was relatively minor; [ ] [X]

(f) The defendant acted under extreme duress or under the substantial domination of another person; [ ] [X]

(g) The youth or advanced age of the defendant at the time of the crime; [ ] [X]

(h) The capacity of the defendant to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law was substantially impaired as a result of mental disease or defect or intoxication which was insufficient to establish a defense to the crime but which substantially affected his judgment. [ ] [X]

(i) Other. _____ [ ] [X]

_____

_____

_____

_____

7. If tried with a jury, was the jury instructed to consider the circumstances indicated in 6. as mitigating circumstances?

   Yes [X] No [ ] These and any and all others as might be indicated from the guilt or sentencing evidence

8. Does the defendant's physical or mental condition call for special consideration?

   Yes [ ] No [X]

9. Although the evidence suffices to sustain the verdict, does it foreclose all doubt respecting the defendant's guilt?

   Yes [ ] No [ ] I can only say I have no doubts.

10. Was the victim related by blood or marriage to the defendant?

    Yes [ ] No [X]

11. If answer is yes, what was the relationship? _____

    _____

    _____

12. Was the victim an employer or employee of defendant?

Victim had repaired defendant's automobile but this was not relevant to the case.

No [ ]
Employer [ ]
Employee [ ]

13. Was the victim acquainted with the defendant?

No [ ]
Casual Acquaintance [X]
Friend [ ]

14. Was the victim local resident or transient in the community?

Resident [X]
Transient [ ]

15. Was the victim the same race as defendant?

Yes [X] No [ ]

16. Was the victim the same sex as the defendant?

Yes [X] No [ ]

17. Was the victim held hostage during the crime?

No [X]
Yes - Less than an hour [ ]
Yes - More than an hour [ ]

18. Was the victim's reputation in the community:

Good [X]
Bad [ ]
Unknown [ ]

19. Was the victim physically harmed or tortured?

Yes [ ] No [X]

If yes, state extent of harm or torture. _____

Death from multiple gunshot wounds

established to be instantaneous

20. What was the age of the victim? 35

21. If a weapon was used in commission of the crime, was it:

No weapon used	[ ]
Poison	[ ]
Motor vehicle	[ ]
Blunt instrument	[ ]
Sharp instrument	[ ]
Firearm	[X]
Other _____	[ ]

22. Does the defendant have a record for prior convictions?

Yes [X] No [ ]

23. If answer is yes, list the offenses, the dates of the offenses and the sentences imposed:

Offense	Date of Offense	Sentence Imposed
a. Robbery	July 1961 (Alcorn Co. Miss)	10 yrs. (Probation)
b. Grand Larceny	Oct 1966 (Shelby Co. TN)	5 yrs.
c.		
d.		
e.		

24. Was there evidence the defendant was under the influence of narcotics or dangerous drugs at the time of the offense?

Yes [ ] No [X]

25. Was there evidence the defendant was under the influence of alcohol at the time of the offense?

Yes [ ] No [X]

26. Was the defendant a local resident or transient in the community?

Resident [X]
Transient [ ]

D. REPRESENTATION OF DEFENDANT*

1. Date counsel secured. July 8, 1977

2. How was counsel secured?

   a. Retained by defendant [X]
   b. Appointed by court [ ]
   c. Public defender [ ]

3. If counsel was appointed by court, was it because:

   a. Defendant unable to afford counsel? [ ]
   b. Defendant refused to secure counsel? [ ]
   c. Other (explain) _____
   _____
   _____

4. How many years has counsel practiced law?

   a. 0 to 5 [ ]
   b. 5 to 10 [ ]
   c. over 10 [X]

5. What is the nature of counsel's practice?

   a. Mostly civil [ ]
   b. General [ ]
   c. Mostly criminal [X]

6. Did the same counsel serve throughout the trial?

   Yes [X] No [ ]

7. If not, explain in detail. _____

_____

_____

*(If more than one counsel served, answer the above questions as to each counsel and attach to this report.)

E. GENERAL CONSIDERATIONS

1. Was race raised by the defense as an issue in the trial?

   Yes [ ] No [X]

2. Did race otherwise appear as an issue in the trial?

   Yes [ ] No [X]

3. What percentage of the population of your country is the same race as the defendant?

   a. Under 10%.....[ ]
   b. 10 to 25%.....[ ]
   c. 25 to 50%.....[ ]
   d. 50 to 75%.....[X]
   e. 75 to 90%.....[ ]
   f. Over 90%.....[ ]

4. Were members of defendant's race represented on the jury?

   Yes [X] No [ ]

How many of defendant's race were jurors?
1, 2, 3, 4, 5, 6, 7, 8, 9, 10, (11), 12

5. If not, was there any evidence they were systematically excluded from the jury?

   Yes [ ] No [X]

6. Was the jury instructed to exclude race as an issue?

   Yes [ ] No [X]

7. Was there extensive publicity in the community concerning this case?

   Yes [X] No [ ]

8. Was the jury instructed to disregard such publicity?

   Yes [X] No [ ]

9. Was the jury instructed to avoid any influence of passion, prejudice, or any other arbitrary factor when imposing sentence?

   Yes [X] No [ ]

10. Was there any evidence that the jury was influenced by passion, prejudice, or any other arbitrary factor when imposing sentence?

    Yes [ ] No [X]

11. If answer is yes, what was that evidence? _____

    _____

    _____

12. General comments of the Trial Judge concerning the appropriateness of the sentence imposed in this case:
Under the evidence and law this was the appropriate verdict. The jury was aware that the actual perpetrator had rec'd a life sentence on his plea of guilty. There was evidence of 4 agg. cir although jury found but one. The one agg. cir as found by the jury is an essential element of the substantive offense of accessory before the fact.

F. CHRONOLOGY OF CASE

		Elapsed Days
1.	Date of offense May 23, 1977	
2.	Date of arrest July 8, 1977	
3.	Date trial began October 17, 1977	
4.	Date sentence imposed October 22, 1977	
5.	Date post-trial motions ruled on Jan. 27, 78	
6.	Date trial judge's report completed Feb. 10, 78	
7.	*Date received by Supreme Court	
8.	*Date sentence review completed	
9.	*Total elapsed Days	

*To be completed by Supreme Court:

This report was submitted to the defendant's counsel for such comments as he desired to make concerning the factual accuracy of the report, and

1. His comments are attached [ ]
2. He stated he had no comments [ ]
3. He has not responded [ ]

I hereby certify that I have completed this report to the best of my ability and that the information herein is accurate and complete.

2-17-78
Date

s/ James C. Beasley

Judge, Crim. Court

of Shelby County

Opposition

Office - Supreme Court, U.S.
FILED
NOV 20 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-598

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

RICHARD HALE AUSTIN,
Petitioner,

vs.

STATE OF TENNESSEE,
Respondent.

On Petition For Writ Of Certiorari To The Supreme Court of Tennessee

RESPONDENT'S BRIEF IN OPPOSITION

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No. 81-598

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

RICHARD HALE AUSTIN,
Petitioner,

vs.

STATE OF TENNESSEE,
Respondent.

On Petition For Writ Of Certiorari To The Supreme Court of Tennessee

RESPONDENT'S BRIEF IN OPPOSITION

OPINIONS BELOW

The opinion of the Tennessee Supreme Court is reported at 618 S.W.2d 738.

JURISDICTION

Petitioner seeks to invoke this Court's jurisdiction under 28 U.S.C. § 1257(3). Respondent submits that this record does not present a substantial federal question. The judgment of the Tennessee Supreme Court was entered on May 26, 1981. Petitioner's petition to rehear was denied on July 27, 1981. Petitioner timely filed his Petition for Writ of Certiorari with this Court.

STATEMENT OF THE CASE

Richard Austin was indicted for first degree murder by the Shelby County Grand Jury on July 19, 1977. The defendant was found guilty of this offense on October 22, 1977. After a sentencing hearing, the jury fixed punishment at death. The jury unanimously found the following aggravating circumstances: "the defendant committed the murder for remuneration or the promise of remuneration, or employed another to commit the murder for remuneration or the promise of remuneration." The jury unanimously found "there are no mitigating circumstances sufficiently substantial to outweigh the statutory aggravating circumstances so listed."

Petitioner appealed to the Tennessee Supreme Court which affirmed the judgment.

REASONS FOR DENYING THE WRIT

Respondent insists that the Tennessee Supreme Court correctly affirmed the trial court's judgment approving the jury verdict finding the petitioner guilty of first degree murder and fixing his punishment at death. The Tennessee Supreme Court did not decide a federal question of substance not heretofore determined by this Court or decide such a question in a way not in accord with the applicable decisions of this Court. Nor did the Tennessee Supreme Court decide a federal question in a way in conflict with another state court of last resort or of a federal court of appeals. See Supreme Court Rule 17.1. There being no special and important reasons for a grant of certiorari in this case, the Court in its sound judicial discretion should deny the writ sought here.

ARGUMENT

I.

The Imposition Of A Death Sentence Does Not Violate The Eighth And Fourteenth Amendments.

This Court in *Gregg* v. *Georgia,* 428 U.S. 153 (1976), specifically rejected petitioner's contention that the imposition of a death sentence, *per se,* violates the Eighth Amendment prohibition against cruel and unusual punishment. *Gregg,* 428 U.S. at 186. Petitioner has shown no reason for this Court to re-examine this ruling.

II.

Sufficient Notice Of Aggravating Circumstances Is Provided In Tenn. Code Ann. § 39-2404(i) (1981 Supp.).

In *State* v. *Berry,* 592 S.W.2d 553, 562 (Tenn. 1980), the Tennessee Supreme Court rejected the petitioner's argument that an accused must be placed on advance notice of the state's intended proof of aggravating circumstances. The court found that all of the aggravating circumstances, except that relating to prior convictions, inhere in the record and are demonstrated by the proof required at the guilt phase. The statute thus provided petitioner with notice of which aggravating circumstances were present in the facts of his crime.

This conclusion is supported by the decision in *Spinkellink* v. *Wainwright,* 578 F.2d 582 (5th Cir.), *cert. denied* 440 U.S. 976 (1978). Furthermore, in denying a stay of execution in which the issue of notice was incorporated, Justice Rehnquist stated that he did "not believe that four members of this Court would find that claim either factually or legally sufficient to persuade them to vote to grant certiorari. . ." *Spinkellink* v. *Wainwright,* 442 U.S. 1301, 1306 (1979).

In *Houston* v. *State,* 593 S.W.2d 267 (Tenn.), *cert. denied,* 449 U.S. 891 (1980), this Court found this issue did not warrant the granting of certiorari. The writ should also be denied in this case.

III.

Tenn. Code Ann. § 39-2404 (1981 Supp.) Provides The Necessary Guidance For The Jury To Consider Aggravating And Mitigating Circumstances In Determining Whether To Impose A Sentence Of Death. This Process Is Not Vague Nor Does It Create Any Double Jeopardy Implications.

In his third and fifth issues, petitioner contends the process by which the jury considers aggravating and mitigating circumstances is vague and that the sentencing process of Tenn. Code Ann. § 39-2404 (1981 Supp.) involves double jeopardy implications. These issues were presented to this Court and found not to warrant the granting of certiorari in *Houston* v. *State,* 593 S.W.2d 267 (Tenn.), *cert. denied,* 449 U.S. 891 (1980). *See State* v. *Groseclose,* 615 S.W.2d 142, 150 (Tenn. 1981), *cert. denied,* 50 U.S.L.W. 3250 (U.S. October 5, 1981), in which this Court again denied certiorari on the alleged vagueness of the statute. These issues thus do not warrant the granting of certiorari by this Court in this case.

In *Houston, supra,* the Supreme Court of Tennessee construed the sentencing provisions of this Act. It held that the Act:

> "does not provide for an 'automatic life sentence,' in any sense other than that life imprisonment is the minimum sentence for first degree murder. No sentence is imposed or can be imposed by the jury until after the 'sentencing hearing.' T.C.A. § 39-2404(a). The standards provided in T.C.A. § 39-2404 are not elements of the offense but establish guidelines for the exercise of the jury's discretion in determining punishment."

This Court must take this statute as though it reads precisely as the highest court of the State has interpreted it. *Wainwright* v. *Stone,* 414 U.S. 21 (1973). Thus, petitioner's initial allegations are to no avail since he attempts to construe this statute contrary to the interpretation of this State's highest court.

Tenn. Code Ann. § 39-2404(e), (f), and (g) (1981 Supp.) deal with the manner in which the jury arrives at punishment. In *Gregg* v. *Georgia,* 428 U.S. 153, 192 (1976), this Court made it clear that some guidance must be given the jury in arriving at a punishment when the death penalty is a possible punishment:

> "Since the members of a jury will have had little, if any, previous experience in sentencing, they are unlikely to be skilled in dealing with the information they are given [in the sentencing hearing]. ...It seems clear, however, that the problem will be alleviated if the jury is given guidance regarding the factors about the crime and the defendant that the State, representing organized society, deems particularly relevant to the sentencing decision."

The legislature of Tennessee provided for the necessary guidance of the jury by detailing the manner in which the jury is to arrive at punishment, and by requiring the jury to consider evidence of aggravating circumstances and of mitigating circumstances, as provided in subsections (f) and (g) of Tenn. Code Ann. § 39-2404 (1981 Supp.). Subsection (3) provides that all evidence introduced at both the guilt *and* sentencing hearings may be considered in arriving at punishment.

Under these statutes, in arriving at the sentence, the jury must first determine whether the State has proved any of the statutory aggravating circumstances beyond a reasonable doubt. If the jury finds that none of the statutory aggravating circumstances has been established by the State beyond a reasonable doubt, they must return a verdict of life imprisonment. Tenn. Code Ann. § 39-2404(f) (1981 Supp.).

To arrive at a punishment of death, the jury must find that the State has established a statutory aggravating circumstance or several statutory aggravating circumstances beyond a reasonable doubt. Additionally, however, the jury must find that the statutory aggravating circumstances or circumstances so found are not outweighed by one or more mitigating factors. These separate determinations must be put in writing and given to the judge along with the sentence of death, thus assuring that the jury has gone through the correct analysis in arriving at a death sentence. This is the suggested procedure of the Model Penal Code § 201.6, 271 n.6 (1976). This procedure was followed in the instant case with the jury finding one aggravating circumstance and no mitigating circumstances sufficiently substantial to outweigh that circumstance.

Tenn. Code Ann. §§ 39-2404(i) and 39-2404(j) set forth the aggravating and mitigating circumstances. Any factor may be considered in mitigation, not just the specified statutory factors. These circumstances are presented for the jury to consider to weigh in exercising its "controlled" discretion in a determination of what sentence should be imposed. The jury is not required to return a mandatory verdict of death. It must consider mitigating factors. Thus, this statute provides consitutional procedure. *See Proffitt* v. *Florida,* 428 U.S. 242, 248-249 (1976). The weighing of evidence is the normal function of a jury. Where the statutes provide adequate guidelines, the requirement of weighing aggravating and mitigating circumstances does not render the statute unconstitutionally vague. *See State* v. *Pierre,* 572 P.2d 1338 (Utah 1977), *cert. denied,* 439 U.S. 882 (1978).

IV.

Specific Findings As To The Presence Or Absence Of Mitigating Circumstances Are Not Constitutionally Required.

This issue has been raised for the first time in this petition. It should not, therefore, be considered. *Monks* v. *New Jersey,* 398 U.S. 71 (1970). Furthermore, specific findings of mitigating circumstances are not required. The evidentiary record fully discloses what mitigating factors might have been considered. *See Gardner* v. *Florida,* 430 U.S. 349 (1977). The jury has properly weighed those factors. *See* Section III, *supra.* Written findings are thus not required to disclose the basis for the jury's determination. *See Andrews* v. *Morris,* 607 P.2d 816, 823 (Utah), *cert. denied,* 449 U.S. 891 (1980), in which the court held written findings of aggravating circumstances are not constitutionally required. This issue does not raise a substantial federal question.

V.

No "Inadmissible Evidence" Was Presented At The Sentencing Hearing. Tenn. Code Ann. § 39-2404(c) (1981 Supp.) Is Not Facially Unconstitutional.

Petitioner contends Tenn. Code Ann. § 39-2404(c) (1981 Supp.) is unconstitutional because it permits the introduction of "inadmissible evidence" at the sentencing hearing. No such evidence was introduced at petitioner's hearing. *Austin* v. *State,* 618 S.W.2d 738, 742 (Tenn. 1981). This statute is facially constitutional. *Gregg* v. *Georgia,* 428 U.S. 153, 203 (1976); *Williams* v. *New York,* 337 U.S. 241 (1949). This issue does not warrant the granting of certiorari.

VI.

The Tennessee Provisions For Appellate Review Are Constitutionally Sufficient.

Tenn. Code Ann. § 39-2406 is patterned after the appellate provisions of Georgia's statutes. Tenn. Code Ann. § 39-2406 does not, however, require specific referral to the cases compared in determining the proportionality of the sentence as is required by the Georgia statute. *See Gregg* v. *Georgia, supra,* 428 U.S. at 205 n.56. However, this Court in *Proffitt* v. *Florida,* 428 U.S. 242, 259, (1976) held that where the appellate court made such a proportionality comparison, the statute, as interpreted, provided for sufficient appellate review. The court made such review in this case. *Austin, supra,* 618 S.W.2d at 741, 742. Review of specific cases since 1970 is not constitutionally required. *Proffitt* v. *Florida, supra,* 428 U.S. at 259 n.16; *State* v. *Shaw,* 255 S.E.2d 799, 807 (S.C.), *cert. denied,* 444 U.S. 957 (1979).

In *State* v. *Groseclose,* 615 S.W.2d 142, 150 (Tenn. 1981), *cert. denied,* 50 U.S.L.W. 3250 (U.S. October 5, 1981), this same issue was raised and rejected by the Supreme Court of Tennessee. This Court found the issue did not warrant the granting of certiorari. That same finding should be made in this case.

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

ROBERT LOUIS JOLLEY, JR.
Senior Assistant Attorney General

CERTIFICATE OF SERVICE

I hereby certify that three true and exact copies of the foregoing have been forwarded by first class U.S. mail, postage prepaid, to J. N. Raines, Attorney at Law, 1700 One Commerce Square, Memphis, TN 38103, this the 19th day of November, 1981.

ROBERT LOUIS JOLLEY, JR.
Senior Assistant Attorney General